

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SPOKANE COUNTY DEPUTY SHERIFFS
ASSOCIATION,

Plaintiff,

v.

STATE OF WASHINGTON DEPARTMENT
OF EMPLOYMENT SECURITY, an
Agency of the State of
Washington, and SPOKANE COUNTY,
a political subdivision of the
State of Washington,

Defendants.

NO. CV-05-0382-EFS

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS, DENYING
AS MOOT OTHER PENDING
MOTIONS, ENTERING JUDGMENT,
AND CLOSING FILE**

A hearing was held in the above-captioned matter on October 12, 2006. Plaintiff Spokane County Deputy Sheriffs Association ("the Association") was represented by Brian Werst. Holly Vance appeared on behalf of the Defendant State of Washington Department of Employment Security ("DES"); and Robert Binger appeared on behalf of Defendant Spokane County. Before the Court were several motions, including: (1) DES's Motion to Dismiss For Lack of Jurisdiction and, Alternatively, Motion for Judgment on the Pleadings (Ct. Rec. 18), (2) Spokane County's Motion to Dismiss for Lack of Jurisdiction and, Alternatively, Motion for Judgment on the Pleadings (Ct. Rec. 20), (3) the Association's Motion to

1 Compel Discovery and Testimony (Ct. Rec. 26), (4) the Association's
2 Motion to Strike Defendant State's Response to Plaintiff's Motion to
3 Compel and to Strike Defendant State's LR 56.1 Statement of Undisputed
4 Facts (Ct. Rec. 48), and (5) the Association's Motion for Order to
5 Shorten Time to Hear Plaintiff's Motion to Strike (Ct. Rec. 50). After
6 reviewing the submitted materials and relevant authority and hearing oral
7 argument, the Court was fully informed. This Order serves to supplement
8 and memorialize the Court's oral dismissal of this lawsuit based on lack
9 of jurisdiction.

10 **A. Defendants' Motions to Dismiss**

11 Defendants seek dismissal on the following grounds: (1) the Court
12 lacks jurisdiction because (a) the Defendants have Eleventh Amendment
13 immunity, (b) the Association failed to exhaust federal administrative
14 remedies, (c) the suit is barred by the Declaratory Judgment Act and the
15 Internal Revenue Code, and (d) Federal Rule of Civil Procedure 12(h) (2)
16 because the Association lacks standing to sue; (2) the Association
17 failed to join the federal government, an indispensable party; and (3)
18 the Complaint does not state a claim upon which relief can be granted.
19 The Association opposes the motions, contending that jurisdiction exists,
20 the Association has standing to sue on behalf of the members, and the
21 Complaint states a claim for relief.

22 **1. Jurisdiction**

23 **a. Standard**

24
25 Federal Rule of Civil Procedure 12(b) (1) provides that a suit should
26 be dismissed for "lack of jurisdiction over the subject matter." The

1 jurisdiction of federal district courts and the courts of appeals are
2 limited by the Constitution and "those subjects encompassed within a
3 statutory grant of jurisdiction." *Ins. Corp. of Ireland, Ltd. v.*
4 *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). The
5 plaintiff bears the burden of proof for establishing jurisdiction.
6 *Sopcak v. N. Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995).

7 In order to determine whether the court has jurisdiction to hear a
8 matter, the court is not limited to the plaintiff's allegations. *Land*
9 *v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *Augustine v. United States*, 704
10 F.2d 1074, 1077 (9th Cir. 1983) (quoting *Thornhill Publ'g Co., Inc. v.*
11 *Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)); *Biotics*
12 *Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). However,
13 where the jurisdictional issue and substantive issues are so intertwined
14 that the question of jurisdiction is dependent on the resolution of
15 factual issues going to the merits, the jurisdictional determination
16 should await a determination of the relevant facts on either a motion
17 going to the merits or at trial. *Augustine*, 704 F.2d at 1077 (citing
18 *Thornhill*, 594 F.2d at 733-35).

19 Here, the Court need not consider facts outside of Plaintiff's
20 Complaint in order to address the jurisdictional issues raised by
21 Defendants. Furthermore, the Court determines the jurisdictional issue
22 and substantive issues are not so intertwined that the Court must treat
23 these motions to dismiss as motions for summary judgment.

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1 b. Background

2 In 1950, the federal Social Security Act was amended to allow states
3 to enroll public employees not covered under a public retirement system
4 in Old Age and Survivor's Disability Insurance (OASDI) coverage.
5 (Complaint ¶ 3.2.) The process by which states could participate in such
6 a program was by entering into a section 218 agreement with the federal
7 Social Security Administration. *Id.* ¶ 3.3. Eligible public employees
8 needed to be part of a coverage group, and this coverage group must
9 ratify the section 218 agreement through a majority vote referendum. *Id.*
10 ¶¶ 3.4 & 3.5.

11 In 1951, DES entered into a Section 218 Agreement with the federal
12 Social Security Administration. *Id.* ¶ 3.6. Following, in 1954, Congress
13 extended OASDI coverage to employees of a political subdivision in
14 coverage groups, other than "policeman's and fireman's positions," who
15 were covered under a public retirement system; soon thereafter,
16 Washington modified its Section 218 Agreement to be consistent with this
17 federal amendment. *Id.* ¶¶ 3.7 & 3.8.

18 In 1956, certain public employees in Spokane County conducted a
19 referendum wherein a majority of such public employees authorized Spokane
20 County to enter into a Section 218 Agreement; this included the
21 Association, a labor organization for deputy sheriffs. *Id.* ¶¶ 3.9, 3.10,
22 & 1.1.

23 Later in August 1956, Congress extended OASDI coverage to employees
24 of a political subdivision who were in coverage groups of "policeman's
25 or fireman's positions" and who were covered under a public retirement
26

1 system. *Id.* ¶ 3.11. On August 2, 1958, Washington's Section 218
2 Agreement was modified to allow a policeman's position or fireman's
3 position to be subject to OASDI coverage if they were offered
4 participation by the state or local government and the members of such
5 coverage groups conducted a referendum and ratified participation in the
6 plan. *Id.* ¶ 3.13. It is Plaintiff's argument that at no time after
7 August 1958 did the members of the Association vote to authorize
8 participation or receipt of OASDI coverage; however, notwithstanding this
9 lack of vote, since 1956, members of the Association have had funds
10 withheld from their earnings by Spokane County or made payments to
11 Spokane County for OASDI coverage. *Id.* ¶¶ 3.14-.16.

12 On August 28, 2004, DES issued a letter stating that participation
13 by the members of the Association in the OASDI system since 1956 was
14 invalid. *Id.* ¶ 3.17. Later, this Determination was withdrawn, and on
15 July 19, 2005, a letter was issued by DES that stated members of the
16 Association are entitled to OASDI coverage. *Id.* ¶¶ 3.18 & 3.19.

17 c. Eleventh Amendment
18

19 Defendants argue the Court lacks jurisdiction because the lawsuit
20 against them is barred by the Eleventh Amendment given that they have not
21 waived their sovereign immunity for lawsuits seeking retroactive monetary
22 reimbursement; the Association disagrees given the language of the
23 Section 218 Agreement and RCW 41.48.030 and the working arrangement set
24 up by such. The Eleventh Amendment prohibits actions against a state or
25 state agency in federal court. *Edelman v. Jordan*, 415 U.S. 651, 663
26

1 (1974); *Clallam County v. Dep't of Transp.*, 849 F.2d 424, 426 (9th Cir.
2 1988). Specifically, the Eleventh Amendment provides:

3 The Judicial power of the United States shall not be construed
4 to extend to any suit in law or equity, commenced or prosecuted
5 against one of the United States by Citizens of another State,
6 or by Citizens or Subjects of any Foreign State.

7 U.S. Const. amend. XI. However, this immunity is not absolute and can
8 be waived if (1) the state expressly waives its immunity to suit in
9 federal court, (2) Congress expresses its intent to abrogate the state's
10 immunity, or (3) the act manifests a clear intent to condition a state's
11 receipt of federal benefits on the state's waiver of its immunity.
12 *Clallam County v. Dep't of Transp.*, 849 F.2d 424, 426-27 (9th Cir. 1988).
13 "A waiver of immunity must be unequivocally expressed." *Pit River Home*
14 *& Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir.
15 1994).

16 The Court concludes waiver has not occurred. First, there is
17 nothing explicit within the wording of the Section 218 Agreement that
18 states the State, or its agencies, waived their immunity to suit in
19 federal court. (Ct. Rec. 25-5.) Rather the Agreement simply memorializes
20 that the State agreed to administer the collection of social security
21 payments, while also agreeing to forward these amounts to the federal
22 Secretary of the Treasury. Similarly, such express language is missing
23 in RCW 41.48.030, pursuant to which the Legislature gave the governor the
24 authority to enter into an agreement with the federal government
25 establishing the terms and provisions relating to social security
26 benefits.

1 Second, the Court finds that Congress did not express an intent to
2 abrogate the State's immunity. Section 404.1204 of title 20 of the Code
3 of Federal Regulations does require each state, which enters into a
4 Section 218 Agreement, to designate an official authorized to act on the
5 state's behalf in administering the agreement. However, this regulation
6 does not specify that a state is waiving its immunity if it enters into
7 such an agreement.

8 Furthermore, the Court concludes the federal act allowing states to
9 enroll public employees in OASDI coverage does not manifest a clear
10 intent to condition the state's participation in such a program on a
11 waiver of its immunity. The Court finds the cases cited by Plaintiffs
12 are inapposite: *Doe v. Nebraska*, 345 F.3d 593 (8th Cir. 2003), and *Innes*
13 *v. Kansas State University*, 184 F.3d 1275, 1283 (10th Cir. 1999). In
14 *Doe*, the Eighth Circuit found the state waived its sovereign immunity by
15 agreeing to receipt of funds under the Rehabilitation Act because 42
16 U.S.C. § 2000d-7 specifically stated that in order to accept federal
17 funds the state was required to waive its Eleventh Amendment immunity to
18 certain claims. 345 F.3d at 598. In *Innes*, there was an explicit
19 agreement that the University would perform certain functions in federal
20 bankruptcy court in the event of a discharge suit. 184 F.3d at 1283.
21 Here, however, the Court finds nothing within the language of the Section
22 218 Agreement or applicable state or federal statutes or regulations that
23 explicitly require the Defendants to waive their sovereign immunity. The
24 Defendants' role as an administrator of the Section 218 Agreement and
25 collector of the payments is insufficient to constitute an "explicit"
26 waiver. See *Edelman v. Jordan*, 415 U.S. 651 (1974) ("The mere fact that

1 a State participates in a program through which the Federal Government
2 provides assistance for the operation by the State of a system of public
3 aid is not sufficient to establish consent on the part of the State to
4 be sued in the federal courts." *Id.* at 673.

5 The Court also concludes the principles of *Clallam County v.*
6 *Department of Transportation*, 849 F.2d 424, 427 (9th Cir. 1988), are not
7 applicable given that the Association seeks more than prospective
8 declaratory relief. (Complaint p. 6-14.) The Association seeks
9 reimbursement for past OASDI payments; this is not prospective relief.
10 Accordingly, if the Association amended its Complaint to only seek
11 prospective relief, the Eleventh Amendment may not bar this suit.
12 However, as the Court discusses below, the Association failed to exhaust
13 administrative remedies and so no leave to amend need be given.

14 d. Exhaustion of Administrative Remedies

15 Defendants also seek dismissal on the grounds that jurisdiction is
16 lacking because the Association members did not seek relief from the
17 Social Security Administration as required by 42 U.S.C. § 405(g), or file
18 a claim for refund with the Internal Revenue Service, pursuant to 26
19 U.S.C. § 7422(a). Plaintiff responds that the Association members are
20 not required to exhaust administrative remedies because they are not
21 seeking judicial review of a decision regarding entitlement to benefits
22 or the denial thereof, but rather the legal determination of whether the
23 Association members should or should not be part of the OASDI system;
24 a determination that is necessary before the Association and its members
25 can seek a refund.
26

1 i. 42 U.S.C. § 405(g)

2 Within the Complaint, Plaintiff identified 28 U.S.C. § 1331, the
3 federal question statute, as the statute upon which jurisdiction is
4 based. However, as Defendants highlight, a federal court cannot hear
5 questions regarding the interpretation of the Social Security Act under
6 the general federal statute. See *Briggs v. Sullivan*, 886 F.2d 1132, 1138
7 (9th Cir. 1989). Rather, the requirements of 42 U.S.C. § 405(g) must be
8 satisfied. Section 405(g) provides, in pertinent part:

9 Any individual, after any final decision of the Commissioner
10 of Social Security made after a hearing to which he was a
11 party, irrespective of the amount in controversy, may obtain
12 a review of such decision by a civil action commenced within
13 sixty days after the mailing to him of notice of such decision
14 or within such further time as the Commissioner of Social
15 Security may allow.

16 Courts have determined that this section creates two requirements: (1)
17 a presentment requirement and (2) an exhaustion requirement. The
18 presentment requirement is jurisdictional and cannot be waived;
19 therefore, a claim for benefits must have been presented to the
20 Secretary. *Briggs*, 886 F.2d at 1138. The exhaustion requirement is not
21 jurisdictional and can be waived when the following factors weigh in
22 favor of waiving this requirement: (1) the matter at issue is collateral
23 to a substantive claim of entitlement (collaterality), (2) refusal to
24 provide the relief requested will cause an injury which retroactive
25 payments cannot remedy (irreparability), and (3) the purposes of
26 exhaustion will not be served by delaying a decision on the matter at
issue (futility). *Id.*

1 There are a number of cases analyzing these factors. See *Johnson*
2 *v. Shalala*, 2 F.3d 918, 921 (9th Cir. 1993); *Briggs*, 886 F.2d at 1139-40;
3 *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). The Court concludes
4 analysis of such cases is not required here because it is undisputed that
5 neither the Association nor the Association members have presented a
6 claim for refund to the Secretary of the Treasury. The Association did
7 reportedly ask the County to refund these moneys; however, the Social
8 Security Act requires that the request for a refund be presented to the
9 federal government. Because the presentment requirement is
10 jurisdictional, it is unwaivable and therefore the Association must
11 present a claim for benefits to the Secretary.¹

12 *ii.* 26 U.S.C. § 7422(a)

13 Plaintiff submits 26 U.S.C. § 7422(a) is inapplicable because
14 U.S.C. § 405(g) provides a more specific administrative scheme to social
15 security benefits, application of the two statutes leads to inconsistent
16 results, and the OASDI payments are not a tax. For the reasons below,
17 the Court finds § 7422(a) is applicable. Section 7422(a) provides, in
18 pertinent part:

19 No suit or proceeding shall be maintained in any court for the
20 recovery of any internal revenue tax alleged to have been
21 erroneously or illegally assessed or collected, or any penalty
22 claimed to have been collected without authority, or of any sum
alleged to have been excessive or in any manner wrongfully

23 ¹ Although *RoAne v. Mathews*, 538 F.2d 852 (9th Cir. 1976), and
24 *Baker v. Mathews*, 538 F.2d 855, 855-56 (9th Cir. 1976), are not directly
25 on point; these cases support a finding that the Association must first
26 present a request for refund to the Secretary of Treasury.

1 collected, until a claim for refund or credit has been duly
2 filed with the Secretary, according to the provisions of law
3 in that regard, and the regulations of the Secretary
4 established in pursuance thereof.

5 The Court concludes § 7422(a) and 42 U.S.C. § 405(g) are consistent
6 because both require a claimant to submit a refund claim to the Secretary
7 of the Treasury and then appeal a denial of such to the Commissioner.

8 In addition, the Court finds the OASDI payments are "any sum" under
9 § 7422(a), relying upon the Ninth Circuit's decision in *Brennan v.*
10 *Southwest Airlines Co.*, 134 F.3d 1405, 1410 (9th Cir. 1997). The
11 Association argues the OASDI payments were wrongfully collected;
12 therefore, this action involves "any sum alleged to have been . . . in
13 any manner wrongfully collected." 26 U.S.C. § 7422(a). As a result,
14 these OASDI payments fit within the scope of § 7422(a) and a claim for
15 refund must be filed with the Secretary before this action may commence.
16 See also *Tumwater Police Officers' Guild v. Employment Sec. Dep't*, 102
17 Wash. App. 317, n.4 (2000).

18 **B. Summary**

19 Given the Court's above findings that jurisdiction is lacking
20 because sovereign immunity has not been waived and the Association failed
21 to exhaust administrative remedies, the Court need not address
22 Defendants' other arguments. In addition, the Court denies as moot
23 Plaintiff's Motion to Compel Discovery and Testimony and Plaintiff's
24 Motion to Strike Defendant State's Response to Plaintiff's Motion to
25 Compel and to Strike Defendant State's LR 56.1 Statement of Undisputed
26 Facts.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Defendant State of Washington, Department of Employment
3 Security's Motion to Dismiss For Lack of Jurisdiction and, Alternatively,
4 Motion for Judgment on the Pleadings (**Ct. Rec. 18**) is **GRANTED**. This case
5 is **DISMISSED**, and Judgment is to be entered in Defendant's favor.

6 2. Defendant Spokane County's Motion to Dismiss for Lack of
7 Jurisdiction and, Alternatively, Motion for Judgment on the Pleadings
8 (**Ct. Rec. 20**) is **GRANTED**, and Judgment is to be entered in Defendant's
9 favor.

10 3. Plaintiff's Motion to Compel Discovery and Testimony (**Ct. Rec.**
11 **26**) is **DENIED AS MOOT**.

12 4. Plaintiff's Motion to Strike Defendant State's Response to
13 Plaintiff's Motion to Compel and to Strike Defendant State's LR 56.1
14 Statement of Undisputed Facts (**Ct. Rec. 48**) is **DENIED AS MOOT**, but the
15 related Motion for Order to Shorten Time to Hear Plaintiff's Motion to
16 Strike (**Ct. Rec. 50**) is **GRANTED**.

17 6. All pending hearing/trial dates are **STRICKEN** and this file is
18 to be **CLOSED**.

19 **IT IS SO ORDERED.** The District Court Executive is directed to enter
20 this Order and Judgment and provide copies to all counsel.

21 **DATED** this 19th day of October 2006.

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23
24
25 S/ Edward F. Shea
EDWARD F. SHEA
26 United States District Judge

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